FEBRUARY 2018 MICHIGAN BAR EXAMINATION
EXAMINERS' ANALYSES

EXAMINERS' ANALYSIS OF QUESTION NO. 1

Price:

Buggy's argument regarding the price term will succeed because Buggy and Ellen entered a valid contract at the price of $25 per month.

"In order for there to be an enforceable agreement between the parties, there must be 'mutual assent' to be bound—that is, the parties must have a 'meeting of the minds' on all the essential elements of the agreement." *Huntington Nat'l Bank v Daniel J Aronoff Living Trust,* 305 Mich App 496, 508 (2014) (citing *Goldman v Century Ins Co,* 354 Mich 528, 535 (1958); *Dodge v Blood,* 307 Mich 169, 176 (1943)). "'[B]ecause the offeror is entitled to receive what it is it has bargained for, if any provision is added to which the offeror did not assent, the-consequence is not merely that the addition is not binding and that no contract is formed, but that the offer is rejected . . .'" *DaimlerChrysler Corp v Wesco Distrib,* 281 Mich App 240, 247 (2008) (brackets in original) (quoting 2 Williston, Contracts (4th ed, § 6.11, pp 110-117)). "[W]hen negotiating the terms, the acceptance of the final offer must be substantially as made; if the purported acceptance includes conditions or differing terms, it is not a valid acceptance—it is a counteroffer and will not bind the parties." *Huntington Nat'l Bank,* 305 Mich App at 508.

When Ellen sent Buggy a proposed contract with a price term of $50 per month, she was making an offer. When Buggy crossed out the $50 price and wrote "$25," she was rejecting Ellen's offer and making a counteroffer. *See Zurcher v Herveat,* 238 Mich

App 267, 296 (1999) ("For a response to an offer to be deemed an acceptance as opposed to a counteroffer, the material terms of the agreement cannot be altered."). "PIM change an acceptance into a counteroffer, the changes to a material term must themselves be material," id. at 297, and Buggy's reduction of the contract price by half constituted a material change to a material term.

The question then becomes whether Ellen accepted Buggy's counteroffer. "[Ain acceptance sufficient to create a contract arises where the individual to whom an offer is extended manifests an intent to be bound by the offer, and all legal consequences flowing from the offer, through voluntarily undertaking some unequivocal act sufficient for that purpose." *Kloian v Domino's Pizza, LLC,* 273 Mich App 449, 453-54 (2006) (internal quotation marks omitted) (brackets in original). "An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act . . . Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances." Restatement Contracts, 2d, § 30, pp 84-85.

Buggy's counteroffer to Ellen did not "invite or require" acceptance to be made in any particular fashion. Therefore, even though Ellen's offer required Buggy to sign the document, Ellen's own failure to sign the document does not mean that no contract was formed. Instead, "assent to an offer may be indicated by acts as well as by words." *Pakideh v Franklin Commercial Mortgage Group,* 213 Mich App 636, 641 (1995) ("If an offer does not require a specific form of acceptance, acceptance may be implied by the offeree's conduct." *Id.* at 640). Consequently, Ellen's rendering of services implied acceptance of Buggy's counteroffer, which included the $25 price term. *See Wake Plumbing & Piping, Inc v McShane Mech Contr, Inc,* Case No: 2:12-cv-12734, 2014 US Dist LEXIS 102962, at *6 (July 29, 2014) ("A meeting of the minds can be found from performance and acquiescence in that performance."); *DaimlerChrysler,* 281 Mich App at 247 (finding that defendant accepted counteroffer "by performing the contract work.").

Ellen's failure to call ahead:

Buggy will not succeed in her argument that Ellen's failure to call ahead relieves Buggy of her contractual obligation to pay for Ellen's services.

No substantial breach:

"'When performance of a duty under a contract is due any non-performance is a breach. [2 Restatement Contracts, 2d, § 235, p 211.]" *Woody v* Tamer, 158 Mich App 764, 771 (1987) (brackets in original). Buggy is therefore correct that Ellen breached the contract by failing to call ahead for the first treatment. Buggy further argues, however, that because of that breach, she does not have to perform her duty under the contract by paying Ellen (at least for that month). In essence, Buggy is arguing that Ellen's breach discharged Buggy's obligations and that Ellen would have no cause of action against Buggy for failing to perform under the contract.

Under Michigan law, "[h]e who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for failure to perform." *Baith v Knapp-Stiles, Inc,* 380 Mich 119, 126 (1968) (internal quotation marks omitted). *See also Alpha Capital lifymt v Rentenbach,* 287 Mich App 589, 613 (2010) ("[O]ne who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." (internal quotation marks omitted)); *Able Demolition, Inc v City of Pontiac,* 275 Mich App 577, 585 (2007) (same). "However, the rule only applies if the initial breach was substantial." *Id.* Consequently, Buggy's argument will succeed only if Ellen's initial breach was substantial.

"To determine whether a substantial breach occurred, a trial court considers whether the nonbreaching party obtained the benefit which he or she reasonably expected to receive." *Id.* (internal quotation marks omitted). "[T]he words 'substantial breach' . . . must be given close scrutiny. Such scrutiny discloses that the application of such a rule can be found only in cases where the breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible . . ." *Baith,* 380 Mich at 126 (internal quotation marks omitted). Here, the allegedly nonbreaching party, Buggy, obtained the benefit she reasonably expected to receive under the contract: extermination services. While the contract also provided Buggy the benefit of receiving a call from Ellen prior to each treatment so that Buggy could prepare, in this instance Buggy was already prepared, so Ellen's breach caused no damages and did not interfere with Buggy's receipt of the extermination services. In

addition, Ellen's failure to call ahead did not render Buggy's performance "ineffective or impossible."

Waiver:

Buggy also appears to have waived her right to demand performance of the call-ahead requirement for that month. "A waiver may be . . . inferably established by such declarations, acts and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance." *Strom-Johnson Constr Co v Riverview Furniture Store,* 227 Mich 55, 67-68 (1924). *See also H J Tucker & Assocs v Allied Chucker & Eng'g* CO, 234 Mich App 550, 565 (1999) (same). "If the parties mutually adopt a mode of performing their contract differing from its strict terms, . . . or if they mutually relax its terms by adopting a loose mode of executing it, neither party can go back upon the past and insist upon a breach because it was not fulfilled according to its letter." *Goldblum v UAW,* 319 Mich 30, 37 (1947) (ellipses in original; internal quotation marks omitted). Although Ellen did not call ahead, Buggy did not object—in fact, she "invited Ellen inside." By allowing Ellen to perform despite her failure to call ahead, Buggy was acting in a manner "inconsistent with a purpose to exact strict performance" of the call-ahead requirement.

Guarantee:

Buggy will not succeed in invoking the guarantee because she is attempting to apply it to services that are not covered by her current contract with Ellen.

Although the parties' previous contract covered extermination services to kill wasps and other outdoor insects, the current contract covers extermination services to kill only indoor insects. Since the wasps were outdoor insects, their presence would not trigger the guarantee in the current contract. Buggy must pay for the second month's extermination services.

EXAMINERS' ANALYSIS OF QUESTION NO. 2

1. Timelines for Judgment Collection:

Generally, collection efforts are only allowed to begin on a final judgment 21 days after entry. *See* Michigan Court Rule 2.614(A)(1) which states that "[e]xcept as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until 21 days after a final judgment . . . is entered in the case." The statute of limitations for collection on a judgment is 10 years. MCL 600.5809(3). However, a judgment can be timely renewed, which would permit collection efforts to continue through the legal process beyond the initial limitations period. *Van Reken v Darden, Beef & Heitsch,* 259 Mich App 454, 458 (2003).

2. Rita's Wages:

Lauren may seek to garnish Rita's wages by requesting that the court issue a periodic writ of garnishment directing Rita's employer to repeatedly withhold a portion of Rita's wages from her paycheck (maximum 25% of disposable earnings for the workweek, 15 USC 1673(a)(1)). Those funds would be delivered to Lauren to be applied to the judgment balance. See MCL 600.4011; *Ward v DAIIE,* 115 Mich App 30, 35 (1982) and Michigan Court Rule 3.101 governing procedures for post judgment garnishments.

3. Rita's Joint Bank Account:

Lauren may seek from the court a non-periodic writ of garnishment of Rita's joint bank account with Henry, but is likely entitled to only one-half of the account balance. Holders of joint bank accounts are considered joint tenants with rights of survivorship, MCL 487.703, and unless otherwise established, there is a presumption that Rita and Henry are "equal contributors . . . [of deposits to the account] and, therefore, equal owners." *American National Bank & Trust Co of Michigan v Modderman,* 37 Mich App 639, 642 (1972). See also *Danielson v Lazoski,* 209 Mich App 623 (1995). Henry is not the judgment debtor in this instance. As such, and without any further evidence to the contrary, Lauren may most likely recover only from Rita one-half of the joint account balance.

4. Rita's Vehicle:

Lauren may seize Rita's vehicle by seeking from the court an order for seizure of property. If confiscated, the vehicle would be sold and the proceeds delivered to Lauren to be credited to the judgment balance. MCL 600.6001 provides that "Mhenever a judgment is rendered in any court, execution to collect the same may be issued to the sheriff, bailiff, or other proper officer of any county, district, court district or municipality of this state." See also MCL 600.6017 (3) which specifically allows execution to be "made against all personal property of the judgment debtor that is liable to execution at common law, including, but not limited to . . . [g]oods or chattles . . ."

5. Rita's Transferred Funds to Mother's Account:

With respect to the $4,000 that Rita transferred to her mother's account, Lauren could seek relief under the Uniform Voidable Transactions Act (the "act") alleging that the transfer is voidable as to her because it was made "Mith actual intent to hinder, delay, or defraud any creditor of the debtor." MCL 566.34(1)(a). Lauren, as the judgment creditor, would be required to prove by a preponderance of the evidence, that Rita's transfer was fraudulent under the act and therefore voidable as to Lauren. MCL 566.34(3). This should not be difficult to prove as Rita angrily announced in open court that she did not plan for Lauren to receive any money on the judgment. Also, the transfer was made to Rita's mother (who is an "insider" under the act), and occurred the day after entry of the judgment. MCL 566.34(2)(a) and (j). All of these factors strongly support a finding of Rita's actual intent to hide some of her assets from Lauren. Assuming Lauren is successful in her claim that the transfer is voidable, Lauren has several statutory remedies under the act (see MCL 566.37), including asking the court to "levy execution" on the $4,000 that was transferred to Rita's mother's account. MCL 566.37(2).

EXAMINERS' ANALYSIS OF QUESTION 6 NO. 3

1. Evidence Of Bias Does Not Render A Witness Unqualified To Testify.

The court should overrule Polly's objection to Vince taking the stand. Pursuant to MRE 601:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

The facts show Vince is well-spoken, is willing to take an oath and understands he is obligated to testify truthfully. The fact that he has a bias or interest in Sully's vindication because Sully is his younger brother is not a basis for disqualifying Vince as a witness. *Lorenz Supply Co v American Standard Inc,* 100 Mich App 600, 613 (1980), *aff'd on other grounds,* 419 Mich 610 (1984). Rather Vince's bias can be explored on cross-examination as an avenue for impeachment, but is not disqualifying.

2. The Witness's Unrelated Consensual Affair Is Irrelevant Under MRE 401 And, Even If Relevant, It Is Unduly Prejudicial Under MRE 403.

MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

To be relevant, evidence must be material (i.e., of consequence to the determination of the action); it also must have probative value (i.e., make a fact of consequence to the action more or less probable than it would be without the evidence). *People v McKinney,* 410 Mich 413, 418-19 (1981).

The issues of consequence in Polly's action revolve around whether Sully sexually harassed her. Whether a corporate officer who made no decisions in Polly's case was once in a consensual sexual relationship with a person other than his wife

is not a material _ fact of consequence nor does it make it more or less probable that Sully sexually harassed Polly at work.

Moreover, even if relevant, the probative value of the witness's consensual relationship "is substantially outweighed by the danger of unfair prejudice" under MRE 403. See *Elezovic v Ford Motor Co,* 472 Mich 408, 430 (2005) (not an abuse of discretion to rule that prejudicial effect of sexual conduct wholly unrelated to plaintiff's circumstances "would substantially outweigh any probative value the evidence might have"). The moral disapproval by the jury of Vince's extramarital affair could inflame the jury so they would be distracted from the issues in the case.

3. Polly's Impeachment Evidence Is Improper Because It Involves Extrinsic Evidence of a Collateral Matter.

The entire topic of Vince's extramarital affair is also a collateral matter. Evidence unrelated to a material trial issue and used strictly for impeachment purposes is collateral evidence. *Lagalo v Allied Corp (on Rem),* 233 Mich App 514, 518 (1999). It is a "well settled rule that a witness may not be impeached by contradiction on matters which are purely collateral." *Cook v Rontal,* 109 Mich App 220, 229 (1981). Any attack on Vince due to an unrelated consensual relationship, being collateral, is improper for this additional reason.

Nor would the ex-mistress' testimony be proper impeachment evidence. Pursuant to MRE 608, "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." MRE 608(b). *Accord, Lagalo,* 233 Mich App at 518 ("evidence rules do not allow extrinsic evidence to be used to prove specific instances of a witness' conduct for the purpose of attacking the witness' credibility"). See also *People v McGillen #I,* 392 Mich 251, 266-67 (1974) ("As a general rule, a witness may not be contradicted as to collateral, irrelevant, or immaterial matters, and, accordingly, subject to some qualifications, where a party brings out such matters on cross-examination of his adversary's witness, he may not contradict the witness' answers.").

EXAMINERS' ANALYSIS OF QUESTION NO. 4

1. With respect to the first question, workers' compensation is payable if an employee sustains a "personal injury arising out of and in the course of employment." MCL 418.301(1). Joe's lifting of a box at work in performance of his duties clearly satisfies the "arising out of . . ."requirements, i.e., Joe was at work and engaged in a risk of employment. *McClain v Chrysler Corp,* 138 Mich App 723, 728-29 (1984). The close question is -- given Joe's preexisting, non-work related back problem -- could the lift-induced back pain at work be considered a compensable "personal injury"? The mere fact Joe's back problems predated his lift at work does not necessarily mean he has not sustained a fully compensable injury because employers take employees as they are. *Zaremba v Chrysler Corp,* 377 Mich 226, 231-32 (1966). Work can compensably aggravate a preexisting problem. *Rakestraw v General Dynamics Land System,* 469 Mich 220, 230-231 (2003). Whether aggravation of a preexisting problem is compensable is specified by statute: "A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury." MCL 418.301(1).

Therefore, Joe's back pain attributable to the lift at work may or may not constitute a compensable work related injury. It will depend on whether or not the lift created a medically distinguishable pathological change in his preexisting condition. If no medically distinguishable pathology resulted from the lift, then there is no compensable injury. If a medically distinguishable pathological change did result, then there is a compensable injury. Put differently, did Joe merely experience a symptomatic expression of his preexisting back problem at the workplace? Or, did Joe's lift at work result in a pathology medically distinguishable from his preexisting back problem?

The examinee should recognize that additional information is needed to make a credible determination and, **MORE IMPORTANTLY,** should articulate what such information might be. Joe's attorney will need to compare and contrast the medical pathology of Joe's back condition before and after the lift at work. Since Joe saw his doctor both before and after the lift, his doctor is a good source for test results and findings *(e.g.,* X-rays, EMGs, MRIs

etc.) that would likely provide crucial information to formulate a sound opinion.

2. With respect to the second question, the workers' compensation statute defines "disability" as "a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training resulting from a personal injury . . . A limitation of wage-earning capacity occurs only if a personal injury . . . results in the employee's being unable to perform all jobs paying the maximum wages in work suitable to that employee's qualifications and training, which includes work that may be performed using the employee's transferable work skills." MCL 418.301 (4) (a); *Stokes v Chrysler LLC,* 481 Mich 266, 281-83 (2008). "'(W)age earning capacity' means the wages the employee earns or is capable of earning at a job reasonably available to that employee, whether or not wages are actually earned. For the purposes of establishing a limitation of wage-earning capacity, an employee has an affirmative duty to seek work reasonably available to that employee . . . A magistrate may consider good-faith job search efforts to determine whether jobs are reasonably available." MCL 418.301(4) (b); *Stokes, supra.*

Per Joe's doctor's restrictions, Joe cannot return to work at ABC because all jobs there exceed Joe's limitations. And, per Joe's doctor, Joe would not be able to work elsewhere at any job requiring lifting over 20 lbs. While it is possible these facts alone could support a finding of "disability," much more needs to be investigated to formulate a reliable opinion. The attorney needs to know the range of Joe's qualifications and training, *e.g.,* his educational background, prior job experience, and whether Joe's skills might transfer to other work he has not performed be-fore. The attorney also must determine: whether there are any jobs within Joe's qualifications and training "reasonably available;" whether Joe has searched in good faith for work (and, if so, with what result); and, the pay level of any other reasonably available work in comparison to Joe's wages at ABC.

Therefore, the examinee should recognize that to intelligently answer the disability question posed by Joe, an examination of specific statutory criteria is necessary. The bare bones information Joe related to the attorney is insufficient to make a reasoned opinion. The attorney must investigate the factors the statute deems relevant to the determination of disability.

EXAMINERS' ANALYSIS OF QUESTION NO. 5

This question calls for a Michigan choice-of-law analysis. As specified in the question, the indemnification clause is void under Illinois law, while under Michigan law it is enforceable.

In resolving contract law conflicts, Michigan courts have traditionally applied "the law of the place where the contract was entered into." *Chrysler Corp v Skyline Indus Servs, Inc,* 448 Mich 113, 122 (1995). However, Michigan has since moved away from that approach in favor of the one contained in §§ 187 and 188 of the Restatement Second, Conflict of Laws, which emphasizes "the law of the place having the most significant relation with the matter in dispute" as being the proper metric. *Id.*

With two exceptions, § 187 of the Restatement provides that the parties' choice of law should govern "if the issue is one the parties could have resolved by an express contractual provision." *Id.* at 126, citing 1 Restatement Conflict of Laws, 2d, § 187(1). The first exception is that "the choice of law will not be followed if the chosen state has no substantial relationship to the parties or the transaction, or when there is no reasonable basis for choosing that state's law." *Id.,* citing 1 Restatement Conflict of Laws, 2d, § 187(2)(a). The second exception "bars the application of the chosen state's law when it 'would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of g 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.'" *Id.,* citing 1 Restatement Conflict of Laws, 2d, § 187(2)(b).

In the absence of an effective contractual choice-of-law provision, Restatement § 188 instructs courts to consider several factors in determining which state's law to apply:

(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

1 Restatement Conflict of Laws, 2d, § 188(2).

Here, the contract between Cobalt and Delmar specifies that it is governed by Michigan law. Moreover, the parties had good reason to choose Michigan law to govern their contract. Both Cobalt and Delmar have significant contacts with Michigan, as Cobalt's principal place of business is in Michigan, and Delmar is a Michigan corporation. See *Chrysler,* 448 Mich at 126-127.

Thus, the parties' choice of law should be applied unless it can be said that Illinois "has a materially greater interest than Michigan (and, under § 188, would have been the state of applicable law in the absence of the Michigan choice of law) and whether the indemnification provision would have been contrary to a fundamental policy of Illinois." *Id.* at 127. Although Illinois was the place of performance of the construction work (§ 188(2)(c) and (d)), the dispute is between two Michigan corporations over a contract that was negotiated in Michigan and that provides for application of Michigan law. Therefore, it cannot be said that Illinois has a "materially greater interest" than Michigan with regard to indemnification such that the parties' expressed preference for Michigan law should be disregarded.

Because Michigan law applies, Delmar's motion for summary disposition should be denied.

EXAMINERS' ANALYSIS OF QUESTION NO. 6

Cathy's positions must be rejected for a couple reasons. First, there is no such "automatic forfeiture rule" in Michigan. See *Sands v Sands,* 442 Mich 30, 36-37 (1993). While in the dispositional phase of a divorce action a court may award concealed property to the innocent spouse, that determination is to be made employing a variety of factors in reaching an equitable distribution. Second, because a judge's role is to achieve equity in a property distribution, a desire to "punish" a wrongdoer is not a valid consideration. Appropriate property distribution awards are not achieved by rigid, concrete rules of distribution (see *Sparks v Sparks,* 440 Mich 141, 158-159 [1992)), like an automatic forfeiture rule or a metric of punishment. In that regard, Cathy's argument has no merit.

However, that is not to say that employing proper principles of Michigan property distribution, Karl's wrongdoing would be either unaccounted for or ignored. Under Michigan law, property distribution must be equitable, but need not be equal. *Sparks* at 159. Under *Sparks,* the trial court is called on to consider a number of factors, and some may not even be relevant to a given case, while others may be far more salient. To fashion an equitable property distribution, the trial court must have the flexibility to achieve an equitable distribution on the given circumstances.

Under *Sparks,* the factors to consider are "(1) duration of the marriage, (2) contributions of the parties to the marital - estate, (3) age of the parties, (4) health of the parties, (5) life status of the parties, (6) necessities and circumstances of the parties, (7) earning abilities of the parties, (8) past relations and conduct of the parties, and (9) general principles of equity." *Sparks* at 159-160. As stated, a proper distribution of the marital estate should consider some or all of these factors.

Given the factual scenario presented, a few of the factors warrant prominent consideration and weight. First, this is a 35-year marriage; a long marital relationship by any standard. Second, the age of the parties, especially as those ages impact

the earning abilities of the parties. Mid-sixties means one thing for Cathy and yet another for Karl. Karl runs his own business and may continue to do so regardless of his age. Cathy has been out of the work force for decades and in her mid-sixties is not likely to embark on out-of-the-home employment. And significantly, the past relations and conduct of the parties, i.e. Karl's effort to hide assets, is certainly a primary consideration. While the facts are relatively silent on the remaining factors, even considering them contributes little in arriving at an equitable distribution.

As previously stated, an equitable distribution need not mean an equal distribution. However, nothing prevents a court from awarding an unequal distribution that is still equitable. The facts presented here supply the type of scenario where unequal is nevertheless equitable.

Cathy may prevail in getting a greater share of the marital estate but not all of it, because the former would be equitable where the latter would not. Cathy might prevail in getting the concealed property or its value--off the top--because that too may be equitable. But at bottom, her award will not be based on the nonexistent automatic forfeiture rule nor a desire to punish, but rather an appropriate consideration of the factors under *Sparks.*

EXAMINERS' ANALYSIS OF QUESTION NO. 7

The rules governing a premises owner's liability to an invitee are involved. "To establish a prima facie case of negligence," underlying a premises liability claim, "a plaintiff must prove that '(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages.'" *Hill v Sears, Roebuck & Co,* 492 Mich 651, 660 (2012), quoting *Loweke v Ann Arbor Ceiling & Partition Co, LLC,* 489 Mich 157 (2011).

The first step is to determine the duty owed by the landowner to the person coming upon his land. *Hoffner v Lanctoe,* 492 Mich 450, 460 (2012). There are three common-law categories in which visitors to one's land fall: invitees, licensees, and trespassers. One's category dictates the duty owed. Stitt v *Holland Abundant Life Fellowship,* 462 Mich 591, 596 (2000). A customer is an invitee of the property owner. "In general, a premises possessor owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc,* 464 Mich 512, 516 (2001).

However, a landowner's duty to remedy or warn does not generally encompass defects that are "open and obvious." With regard to a premises owner's duty, in *Hoffner,* 492 Mich at 460, the Supreme Court recognized that "an integral component of the duty owed to an invitee considers whether a defect is 'open and obvious.' The possessor of land 'owes no duty to protect or warn' of dangers that are open and obvious because such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." Whether a condition is open and obvious is judged by an objective standard by asking, "Would an average person of ordinary intelligence discover the danger and the risk it presented on casual inspection?" *Price v Kroger Co,* 284 Mich App 496, 501 (2009).

Citing to *Lugo,* 464 Mich at 517, the *Hoffner* Court also addressed an exception to this rule that arises when the

condition is so hazardous or its placement makes even the openly obvious risk unreasonable:

> Yet, as a limited exception to the circumscribed duty owed for open and obvious hazards, liability may arise when *special aspects* of a condition make even an open and obvious risk unreasonable. When such special aspects exist, a premises possessor must take reasonable steps to protect an invitee from that *unreasonable* risk of harm.
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> It is worth noting *Lugo's* emphasis on the narrow nature of the "special aspects" exception to the open and obvious doctrine. Under this limited exception, liability may be imposed only for an "unusual" open and obvious condition that is "unreasonably dangerous" because it "present[s) an extremely high risk of severe harm to an invitee" in circumstances where there is "no sensible reason for such an inordinate risk of severe harm to be presented." The touchstone of the duty imposed on a premises owner being reasonableness, this narrow "special aspects" exception recognizes there could exist a condition that presents a risk of harm that is so unreasonably high that its presence is inexcusable, even in light of its open and obvious nature. *[Hoffner,* 492 Mich at 461-462 (footnotes omitted).]

Under the facts presented, plaintiff Smith could successfully maintain his negligence claim against Grocery Time. With respect to duty, Smith was on the premises to do business with Grocery Time, and thus was an invitee. Consequently, Grocery Time must have exercised reasonable care to protect Smith from an unreasonable risk of harm that could be caused by a condition on the land, here the sinkhole.

Grocery Time will argue, however, that the sinkhole's size and location made it open and obvious. In fact, although this is an objective test, the facts reveal that Smith did see the sinkhole and traversed its edge. There can be little doubt but that a six-foot wide, three-foot deep hole in the middle of a parking lot is open and obvious to an average person, especially in daylight hours. Hence, unless the sinkhole presented a

special aspect, Grocery.Time would have had no duty to warn or protect Smith from the perils of the sinkhole.

The facts suggest that the sinkhole can be considered a special aspect. Indeed, the *Lugo* Court specifically identified "an unguarded thirty foot deep pit in the middle of a parking lot" as an example of an open and obvious danger that "present[s] such a substantial risk of death or severe injury to one who fell in the pit" that it would be an unreasonable risk to maintain on the premises, absent some form of warning or other safety measure. *Lugo,* 464 Mich at 518. Thus, the sinkhole, though not thirty feet deep, nevertheless presented an unreasonable risk of harm despite its open and obvious nature. And, although the facts reveal that Grocery Time employees were bringing warning cones to place by the sinkhole, there was nothing at the time of the injury that would have provided any warning or safety measure to protect an invitee like Smith. Grocery Time breached its duty to Smith.

As to the final two elements, Smith clearly suffered damages as he was injured by the fall, and though an argument could be made that he was comparatively negligent in venturing too close to the sinkhole, the facts suggest that Grocery Time's breach of its duty proximately caused some (or all) of Smith's injuries.

EXAMINERS' ANALYSIS OF QUESTION 8

Landlord Inc.'s motion raises issue preclusion. The preclusion doctrines of res judicata and collateral estoppel "serve an important function in resolving disputes by imposing a state of finality to litigation where the same parties have previously had a full and fair opportunity to adjudicate their claims." *Nummer v Dep't of Treasury,* 448 Mich 534, 541 (1995). Collateral estoppel, or issue preclusion, is at issue here. "Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding." *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer,* 308 Mich App 498, 528 (2014).

"Generally, for collateral estoppel to apply three elements must be satisfied: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co,* 469 Mich 679, 682-84 (2004)[internal quotation marks and citation omitted]. Mutuality of estoppel is not necessary when collateral estoppel is being used defensively. *Id.*

Here, collateral estoppel bars Smith from relitigating whether mold existed in Apartment A. In the district court proceeding Smith raised the issue of mold, and used it as a defense to the action. The district court, in rendering judgment in favor of Landlord Inc., ruled that Apartment A did not contain mold and was not uninhabitable. Determining that fact was essential to the judgment, as it was crucial to deciding whether rent was due during the relevant time period. Additionally, both parties to the district court proceeding had a full and fair opportunity to address the issue, and though not necessary to prove, there is mutuality of estoppel in that Landlord Inc. would also be precluded from raising any issue relative to the existence of mold.

An additional issue is whether Smith's children are estopped from raising the issue of mold. Although the children

were not parties to the district court case, collateral estoppel also applies to privies of the parties in the district court action. *Rental Props Owners Ass'n,* 308 Mich App at 529-30. Privity exists between Smith and her children given their functional working relationship as a family unit as well as their shared interest in establishing the existence of mold in Apartment A. *Adair v* State, 470 Mich 105, 122 (2004). Indeed, the children's interests--as residents of the apartment--were presented and protected during the district court proceedings insofar as Smith asserted that Landlord Inc. failed to provide a safe residence and that she and her children had suffered negative health consequences as a result.

Consequently, for the reasons stated, Landlord Inc.'s motion should be granted.

EXAMINERS ANALYSIS OF QUESTION NO.

1. Pursuant to MCL 450.1487(2), "[a]ny shareholder of record, in person or by attorney or other agent, shall have the right . . . to inspect for any proper purpose the corporation's stock ledger, a list of its shareholders, and its other books and records . . ."

The statute requires a shareholder to give the corporation a written demand, "describing with reasonable particularity" the shareholder's purpose, the records sought, and that "the records sought are directly connected with the purpose." *Id.* Under the statute, a "proper purpose" means "a purpose reasonably related to" the person's interest as a shareholder. *Id.* See also *North Oakland County Bd. of Realtors v Realcomp*, 226 Mich App 54, 59 (1997) ("Proper purpose" under the statute is one that is made in good faith, seeks information bearing upon the shareholder's interest, and is not contrary to the corporation's interest.) The statute also specifically contemplates that a demand is permissible through "an attorney or other agent" so long as the demand is accompanied by "a power of attorney or other writing which authorizes the attorney or other agent to act on behalf of the shareholder." MCL 450.1487(2).

The party bearing the burden of proof differs depending upon the type of document sought. Assuming that the shareholder has complied with the form and manner of making a demand to inspect corporate documents, the burden of proof is allocated as follows:

- If the shareholder seeks to inspect the stock ledger or list of shareholders, the burden of proof is on the ***corporation*** to show that the demand was made for an improper purpose or that the records sought are not directly connected with the shareholder's stated purpose. (MCL 450.1487(3)).

- If the shareholder seeks records *other than* the stock ledger or list of shareholders, the burden is on the ***shareholder*** to establish that the inspection is for a proper purpose and that the documents are directly

connected with the stated purpose. *Oakland County Bd. of Realtors* at 57 - 58.

2. The court has the discretion to permit the shareholder to inspect corporate books and records "on conditions and with limitations as the court may prescribe and may award other or further relief as the court may consider just and proper." (MCL 450.1487(3)).

Sam:

Because the statute allows "any shareholder of record" the right to inspect corporate records, the fact that Sam had only a few shares of stock is irrelevant. The statute contains no minimum amount of stock that must be owned before a shareholder may make a demand for corporate records. Additionally, the fact that he made his demand through his friend is irrelevant, as the statute specifically contemplates making a demand through an agent when authorized by a writing. Sam has demanded a list of shareholders, has complied with the statute concerning the form and manner of the demand, and his demand was accompanied by a written document, permitting Eddie Edwards to act on Sam Smith's behalf.

Thus, the burden of proof will be on WRU to show that Sam's demand was made for an improper purpose or that the records sought are not directly connected with the claimed purpose. Because seeking a shareholder list in order to be nominated to the board of directors is a proper purpose, see *George v International Breweries,* Inc, 1 Mich App 129 (1965), Sam will likely prevail.

Larissa:

Larissa has demanded the design specifications for WRU's newest widget. Because the document sought is neither a stock ledger nor a list of shareholders, the burden is on Larissa to establish that design specifications are sought for a proper purpose and that the documents are directly connected with the stated purpose. Larissa's claim will most likely fail because ensuring that the new widget design is "aesthetically pleasing" is not reasonably related to her interest as a shareholder. This is particularly true considering that Larissa is employed by WRU's competitor, and the information could be used to the

detriment of WRU for the purposes‘ofLunfair competition. If the demand is not sought in good faith for the protection of the interests of the corporation nor the stockholders, a stockholder is not entitled to an order compelling the inspection of corporate documents. See *Slay v Polonia Pub Co*, 249 Mich 609, 616. Larissa's claim will likely fail.

EXAMINERS' ANALYSIS OF QUESTION NO. 10

1. Spencer v Kate:

The ring constituted a gift from Spencer to Kate. A valid gift requires the following three elements (1) an intent by the donor to pass title "gratuitously" to the donee; (2) either actual or constructive delivery of the gift; and (3) acceptance of the gift by the donee. *Buell v Orion* State *Bank,* 327 Mich 45, 55 (1950). If the gift benefits the donee, there is a legal presumption that it has been accepted. *Id.* These elements were satisfied in the instant case.

However, while most gifts convey absolute irrevocable title to the donee, a gift of an engagement ring is an exception. Under Michigan law, "an engagement ring given in contemplation of marriage is an impliedly conditional gift that is a completed gift only upon marriage. If the engagement is called off, for whatever reason, the gift is not capable of becoming a completed gift and must be returned to the donor." *Meyer v Mitnick,* 244 Mich App 697, 703-704 (2001). Thus, because the engagement was cancelled, Spencer is entitled to the return of the ring or its value, and it matters not who is to "blame" for the break-up. "Because the engagement ring is a conditional gift, when the condition is not fulfilled the ring or its value should be returned to the donor no matter who broke the engagement or caused it to be broken." *Id* at 702. Accordingly, Kate's proffered defenses against liability to Spencer have no legal support in Michigan.

2. Kate v Joseph:

Kate created a bailment relationship with Joseph when she delivered her ring to him specifically for work to be performed. A bailment is formed by "the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished." *Goldman v Phantom Freight, Inc.,* 162 Mich App 472, 479-480 (1987) (citations omitted).

A bailee who is entrusted with the •bailor's personal property is responsible for exercising a level of care over the bailed property that corresponds with the three categories of bailment that are distinguished according to who benefits from the relationship. *Godfrey v* ***City of Flint,*** 284 Mich 291, 295296 (1938). Thus, where a bailment is for the sole benefit of the bailor (property owner), the bailee who possesses the property as a favor to the bailor owes "the lowest degrees of responsibility in the triple division of neglects in bailments" and is liable for only gross negligence. *Cadweli v* ***Peninsular State Bank,*** 195 Mich 407, 412-413 (1917). A bailment which benefits both parties requires that the bailee exercise ordinary care in connection with the property and is liable for ordinary negligence. ***Godfrey*** at 297-298. A bailment that benefits only the bailee requires the highest duty of care by the bailee who could be liable for even the slightest negligence. ***Beller v Shultz,*** 44 Mich 529 (1880).

In the instant case, a commercial bailment was created for the mutual benefit of Kate and Joseph in connection with performance of work on the ring in exchange for compensation. Accordingly, Joseph owed a duty of ordinary care with respect to Kate's personal property. Joseph appears to have acted in conformance with the ordinary care standard, having properly secured the jewelry shop before the break-in by a third party occurred. Such diligence by Joseph, while not preventing the theft, would likely absolve Joseph from liability to Kate for failing to return the ring to her. ***Eckerle v Twenty Grand*** *Corp,* 8 Mich App 1, 9-10 (1967).

EXAMINERS' ANALYSIS OF QUESTION NO. 11

1. In Michigan, the summary proceedings act (the "act") governs civil actions to recover possession of real property.
MCL 600.5701 et seq. [illegible] *Felton*
to last *Villa* [illegible] 17 Mich App [illegible]

terminabl
e
683, 688-689
entry of a judgment of possession in certain
amount to retaliation by the plaintiff landlord
particular actions by the defendant tenant to
under the tenancy. The act states in pertinent part:

> (1) A ju
> alleged termination of tenancy shall not be entered against a defendant if 1 or more of the following is established:
>
> (a) That the alleged termination was intended primarily as a penalty for the defendant's attempt to secure or enforce rights under the lease or agreement or under the laws of the state, of a governmental subdivision of this state, or of the United States.
>
> (b) That the alleged termination was intended primarily as a penalty for the defendant's complaint to a governmental authority with a report of plaintiff's violation of a health or safety code or ordinance.
>
> (c) That the alleged termination was intended primarily as retribution for a lawful act arising out of the tenancy, including membership in a tenant organization and a lawful activity of a tenant organization arising out of the tenancy.

MCL 600.5720 (1)(a)-(c).

The facts in the instant case do not suggest any problematic issues between Marvin as tenant and Renee as landlord. The several-years-long, month-to-month tenancy was

incident free. None of the illegal reasons for terminating a tenancy as set forth in the act applies to the tenancy between the two. It is obvious that at worst, Renee's decision to cut tenancy ties with Marvin was a reaction to her disagreements with Mary and a desire to retaliate against Mary in some way. This is evidenced by Renee's angry retort about "fixing" Mary, and then promptly and unexpectedly beginning the process to sever the tenancy relationship with Marvin. While Renee's alleged termination of Marvin's month-to-month tenancy by serving a notice to quit could be characterized as misguided, unkind or unfair, it was not illegal. *Frenchtown* at 688-689. Accordingly, Marvin's retaliation defense will not succeed, and a judgment for possession in favor of Renee may issue.

2. Mary and Ashley owned the mansion as tenants in common.

> Tenants in common are persons who hold land or other property by unity of possession. When two or more persons are entitled to land in such a manner that they have an undivided possession, but separate and distinct freeholds, they are tenants in common. Not only is the possession of one the possession of all, but the tenants respectively have the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole. *[Merritt v Nickelson,* 80 Mich App 663, 666 (1978)].

Accordingly, each tenant in common has the right to sell her own undivided interest in the real property without knowledge or permission of the other cotenant(s). *Albro v Allen,* 434 Mich 271, 282 (1990). Thus, Ashley's property interest sale to Renee cannot be rescinded on the basis that it was illegal. Renee became a tenant in common with Mary upon the sale of Ashley's property interest. *Id.*

EXAMINERS' ANALYSIS OF QUESTION NO. 12

1. Trusts and estates in Michigan are statutorily governed by the Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et al.

1. EPIC provides as follows with respect to the creation of a valid trust:

> (1) A trust is created only if all of the following apply:
>
> (a) The settlor has capacity to create a trust.
>
> (b) The settler indicates an intention to create the trust.
>
> (c) The trust has a definite beneficiary or is either of the following:
>
> (i) A charitable trust.
>
> (ii) A trust for a noncharitable purpose or for the care of an animal . .
>
> (d) The trustee has duties to perform.
>
> (e) The same person is not the sole trustee and sole beneficiary.

MCL 700.7402(1)(a)-(e). A charitable trust is one that is created "for the relief of poverty, the advancement of education or religion, the promotion of health, scientific, literary, benevolent, governmental, or municipal purposes, any purpose described in section 501(c)(3) of the internal revenue code or any other purposes the achievement of which is beneficial to the community." MCL 700.7405(1).

Margo's pronouncement at the awards banquet satisfied all of the statutory elements to create a valid charitable trust. Margo, as the settler, (a) apparently had the capacity to create a trust since the facts do not suggest otherwise; (b) clearly

indicated her intention to create a trust; (c) stated her purpose in creating a trust, which was to advance education in the arts and benefit the community so as to qualify it as a charitable trust; (d) charged the trustee museum with the duty of displaying the collection; and (e) did not create a situation where there was just one beneficiary who was also the sole trustee. The fact that there was no writing creating the trust is not fatal to its validity, as "a trust need not be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence." MCL 700.7407. It is very likely that such clear and convincing evidence exists to support creation of a valid charitable trust in the instant case for the reasons stated above--including also the fact that her oral declaration at the awards banquet was witnessed by 300 people.

2. According to EPIC, "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this act, except as modified by the decedent's will." MCL 700.2101(1). Because Margo had no surviving spouse, and no surviving descendant or parent, the portion of her estate not disposed of by her valid will (i.e. the art collection items owned by her at the time of her passing) would ordinarily have been evenly distributed between her two brothers by representation. MCL 700.2103(c). However, EPIC further allows a decedent by a will to "expressly exclude or limit the right of an individual or class to succeed to property of the decedent that passes by intestate succession." MCL 700.2101(2). Because Margo in her valid will excluded Dennis from any distribution of the art collection items owned by her at the time she passed away, Blake would be entitled to all of those assets. The fact that Blake is Margo's half-brother is of no consequence since according to MCL 700.2107 "[a] relative of the half-blood inherits the same share he or she would inherit if he or she were of whole blood."

If it is determined that Margo created a valid trust during her lifetime with respect to the $700,000 portion of her art collection that was in storage, Dennis and Blake would each take under Margo's will an undivided $200,000 ownership interest in Margo's home, and Blake would also take the entire home art collection valued at $500,000 through intestate succession. However, if it is found that Margo did not create a valid trust during her lifetime, Dennis and Blake would still each take an

undivided $200,000 ownership.: interest in Margo's home under her will, but Blake would succeed to not only the $500,000 portion of the art collection that was located in Margo's home but also the $700,000 portion that was in storage.

EXAMINERS' ANALYSIS OF QUESTION NO. 13

1. The Supreme Court in *Crawford v Washington,* 541 US 36 (2004), and its progeny, fully delineates the evidence classifiable as testimonial. However, as stated in *Crawford* and its progeny, ". . . it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford,* 541 US at 68 (emphasis added). It is this last stated genre of testimonial statements that has received the most analysis and is applicable here.

However, through *Crawford* and its progeny, a "primary purpose" test for out-of-court statements sought to be used against the accused has developed.

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to alter criminal prosecution. *[Ohio v Clark,* 576 U.S. , 135 S Ct 2173, 2179 - 80 (2015) citing *Davis v Washington* and *Hammon v Indiana,* 547 U.S. 813, 822 (2006). See also *Michigan v Bryant,* 562 U.S. 344 (2011).]

Accordingly, it is by this metric that out-of-court statements are analyzed so as to determine whether they are testimonial. The "primary purpose" test remains salient in answering that inquiry.

2. U.S. Constitution Am VI, made applicable to the states in *Pointer v Texas,* 380 U.S. 400, 400 - 401 (1965), states in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . Known as the "Confrontation Clause," it enshrines the accused's right -- at the very least -- to the opportunity to cross-examine the witnesses against him, an

opportunity not presented if the statement-maker never testifies but his out-of-court statements are introduced.

However, for the dictates of the clause to apply, the out-of-court statements must be considered testimonial. As stated in *Crawford,* 541 US at 68, 'Where non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States" the development of rules of evidence pertaining to hearsay. However, "[w]here testimonial statements are involved, we do not think the Framers meant to leave the *Sixth Amendment's* protection to the vagaries of the rules of evidence ." *Id.* at 61 (emphasis in original).

The significance, therefore, of classifying the out-of-court statements of Babe as testimonial or not is that, without such a classification, U.S. Constitution Am VI is inapplicable; only the rules of evidence are. Determining whether the disputed evidence is testimonial is therefore the determining threshold in determining whether confrontation. the clause must be satisfied: by

3. In *Ohio v Clark,* 576 U.S. , 135 S Ct 2173 (2015), the Court visited the primary purpose test on a scenario where the statements were made to school teachers, not police officers. The Court rejected a categorical approach that such statements could simply not be considered testimonial. Rather, the Court adhered to the approach that all relevant circumstances are to be considered in determining the primary purpose of the teacher's inquiries and Babe's responses.

While other touchstones necessary for the application of the confrontation right are present (i.e. this was a criminal case; Babe was unavailable; and no prior opportunity to cross examine is noted), whether Dante's right to confrontation was violated ends where it began: whether Babe's statements are testimonial hearsay. Using the primary purpose test, they are not for the following reasons.

The primary purpose of school personnel's inquiry was not to gather facts to be used to prosecute Dante'. The school had a little boy who was suspected of being abused in their midst and their first concern was tending to his safety. School officials needed to know how he was injured, and, if it was abuse, who had abused Babe, not so that person could be arrested

but rather so as to determine how to protect Babe from further abuse. Certainly, school personnel in charge of the safety and well-being of small children would be motivated by that desire and not -- in contrast to police officers -- ascertaining the identity of the wrongdoer for his prosecution. Choosing between the differing purposes, it is much easier to conclude that school officials were focused on protecting Babe in an emergency situation where he had been abused, rather than to create evidence that would serve as proof of guilt in a trial. Moreover, that school officials were statutorily obligated to contact Child Protective Services and that prosecution could ensue, does not itself transform school personnel into police agents nor color the purpose of their inquiries.

Babe's intent, to the extent it can be gleaned, is also an analytical component. At three, his intent or purpose for speaking is not clear. He probably had little or even any knowledge of the criminal prosecution process. it is highly unlikely he spoke to get Dante' in trouble as opposed to getting himself safe. However, viewing his intent through the prism of the primary purpose test yields the conclusion that that purpose was not to advance criminal prosecution. It must be remembered, he spoke to his teachers, on whom he is totally reliant in school, a familiar and comfortable location, and seemed to be seeking to make things better.

Finally, and relatedly, the lack of formality in the location, as well as the questioning, is as well a factor, among others, suggesting Babe's statements were not prompted by a desire to marshal faCts for prosecution.

The admission at Dante's trial of Babe's unconfronted statements did not violate his right to confrontation because, employing the primary purpose test, Babe's statements were not testimonial, as that term is understood from *Crawford* and its progeny and, therefore, not embraced by the U.S. Constitution Am VI Confrontation Clause.

EXAMINERS' ANALYSIS OF QUESTION NO. 14

1. Elements of Charged Offense:

The elements of the charged offense of Possession with Intent to Deliver less than 50 grams of Cocaine are (1) the defendant knowingly possessed a controlled substance, (2) the defendant intended to deliver this substance to someone else, (3) the substance possessed was cocaine and the defendant knew it was cocaine, (4) the weight of the substance was less than 50 grams, and (5) the defendant was not legally authorized to possess this substance. MCL 333.7401(2)(a)(iv).

2. Sellers' Arguments Regarding Possession:

While it is true from the facts that Sellers was not arrested while in actual possession of the cocaine, the salient element is not limited to actual possession. Under Michigan law, the term "possession" connotes dominion or the right to control over the drug with knowledge of its presence or character. *People v Germaine,* 234 Mich 623, 627 (1926). The term "possession" is to be construed in its commonly understood sense and may encompass both actual and constructive possession. *People v Harper,* 365 Mich 494, 506-507 (1962). Possession may be proved by circumstantial evidence and reasonable inferences therefrom. *People v Allen,* 390 Mich 383 (1973). See also *People v Konrad,* 449 Mich 263, 271 (1995).

As stated in *People v Wolfe,* 440 Mich 508, 519-520 (1992), "A person need not have actual physical possession of a controlled substance to be guilty of physically possessing it. Possession may be either actual or constructive." In *Wolfe,* the Court observed "there was no direct evidence that defendant Wolfe actually possessed the cocaine." *Id.* at 520. Instead, the Court focused on whether he "had the right to exercise control of the cocaine and knew **it** was present." *Id.* citing *People v Germaine,* 234 Mich 623, 627 (1926).

Sellers' argument that the charge is unwarranted due to the lack of proof of his actual possession of the cocaine ignores the concept of constructive possession discussed above. Moreover, the stated facts easily lead to the conclusion that

the cocaine found in the bedroom was under Sellers' control, for many reasons. First, the mail on the coffee table inferentially established that Sellers lived at the address. Second, of the two men living in the home, each seemed to have their own bedroom. Third, in addition to the cocaine found in the back bedroom, also found was a prescription bottle in Sellers' name and clothing associated with his size - the latter in contrast to the clothing found in Harvey's room. It is not unreasonable to assume one would place their own clothes in a closet in one's own bedroom. Fourth, the ledger book was found in the nightstand by the bed and the notations suggest an awareness of the drug. In sum, the facts demonstrate Sellers was in control of the bedroom and its contents.

Therefore, based on application of the law to the facts presented, Sellers' argument must be rejected that proof of the possession element of the charge is lacking.

3. **Lack of Intent:**

As previously stated, the elements of the charge can be established by circumstantial evidence and inferences thereon. For the more serious offense involving the intent to deliver, that intention distinguishes the crime from the lesser offense of simple possession. For the offense of possession with intent to deliver, the possession must be coupled with a specific intent to deliver. See *People v Johnson,* 68 Mich App 697 (1976).

The stated facts easily establish an intent to deliver the cocaine and, therefore, prompt rejection of Sellers' argument. First, the large amount of the drug, 32 grams, suggests an intention for possession beyond mere usage. Second, to the extent that the first point is debatable, the cocaine being packaged in one large bag and in four "individual" bags, buttresses the point about quantity. Third, the individual bags being separate and apart from each other bespeak a purpose other than mere possession. Fourth, the names, dollar amounts, and weights contained in the ledger suggest the cocaine was destined for conveyance. Finally, the presence of a scale in the bedroom closet in close proximity to the drugs and packing material is clearly suggestive of something more involved than simple possession.

Given the foregoing, Sellers' claim of lack of the requisite intent is without merit.

EXAMINERS' ANALYSIS OF QUESTION NO. 15

In *Miranda v Arizona,* 384 US 436 (1966), the United States Supreme Court held that the 5th Amendment's prohibition against "self-incrimination requires that the accused be given a series of warnings before being subjected to 'custodial interrogation.'" *People v Elliott,* 494 Mich 292, 301 (2013), citing *Miranda* at 444. The Court explained that "[t]he right to have counsel present during custodial interrogation is a corollary of the right against compelled self-incrimination, because the presence of counsel at custodial interrogation is one way in which to 'insure that statements made in the government-established atmosphere are not the product of compulsion." *Elliott,* supra, at 301, citing *Miranda* at 466, 470. Where custodial interrogation is done in the absence of *Miranda* warnings, the accused's statements may not be introduced into trial. *Miranda* at 444-445.

Given the foregoing, the issue is whether the scenario presented amounts to "custodial interrogation" as that term is understood from *Miranda* and its progeny. If found to be "custodial interrogation," the clear absence of warning renders James' statements inadmissible. On the other hand, if not custodial interrogation, the warnings were not required and therefore their absence would not call for suppression.

Miranda defines "'custodial interrogation' as 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'" *Elliott,* at 305 citing *Miranda,* 384 US 436 at 444. Stated similarly, custodial interrogation occurs "during 'incommunicado interrogation of individuals in a police-dominated atmosphere'." *Illinois v Perkins,* 496 US 292, 296 (1990) quoting *Miranda,* 384 US 436 at 445. The concern is unwarned confessions in a police-dominated atmosphere that is said to generate inherently compelling pressures which work to undermine an individual's will to resist and to compel him to speak where he would not otherwise do so freely. The strictures of *Miranda* require adherence ". . . only in those types of situations in which the concerns that powered

the decision are implicated." *Perkins* at 296 quoting *Berkemer v McCarty,* 468 *US* 420, 437 (1984).

The Supreme Court later explained that the sheer fact the accused was imprisoned or incarcerated is not determinative of whether *Miranda* custody exists. *Howes v Fields,* 565 US (2012); 132 S Ct 1181, 1190 (2012); and see *Maryland v Shatzer,* 559 US 98, 111-112 (2010). Aside from simply being in custody/incarcerated, ". . . whether incarceration constitutes custody for *Miranda* purposes . . . depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against - the danger of coercion [that] results from the *interaction* of custody and official interrogation." *Elliott,* 494 Mich 292 at 306 (quotation marks and internal citation omitted).

The applicable test therefore is not limited to whether the accused is in custody, but rather is a multifaceted analysis based on all the attendant circumstances. *Stansbury v California,* 511 US 318, 322 (1994). Rather, the focus is to address two questions. First, ". . . whether in light of the objective circumstances of interrogation a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Elliot* at 307 (quotation marks and internal citation omitted). Factors to be considered "include the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning and the release of the interviewee at the end of the questioning." *Id.* And second, ". . . whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda." Id.*

Applying these principles to the facts presented yields the conclusion that (1) James was not in custody for *Miranda* purposes; (2) therefore, any interrogation was not "custodial interrogation;" (3) with a lack of custodial interrogation, the questioning troopers were not obligated to provide James with *Miranda* warnings; and (4) their failure to do so does not require suppression of his statements.

On the question of whether a person in James' position would have been free to leave, the facts indicate the questioning was done in an open conference room, not some

closed-off side room in the bowels of the prison. The questioning lasted three hours, certainly not brief nor necessarily onerous. The facts are silent on the statements made other than James was told more than once he could go back to his cell if he wanted. James was not restrained and, at the interview's end, he was returned to his cell by prison personnel. On balance, a reasonable person in James' position would not believe he was not free to return to his cell.

On the second question, the scenario described has little if any similarities to the police station interrogation at issue in *Miranda.* The troopers were not in control of James' coming and going; prison guards were in control. The questioning troopers had no influence on James' release; he was serving a prison sentence unconnected to the topic at hand. Relatedly, the troopers had no ability to control where James went, no matter what he said. As stated in *Elliott,* this "is hardly the sort of incommunicado, police-dominated atmosphere involving custodial interrogation and the 'overbearing' of the subject's will toward which *Miranda* was directed." *Elliott,* 494 Mich at 313.

James' motion to suppress should be denied.